BEFORE THE
POLLUTION CONTROL HEARINGS BOARD
STATE OF WASHINGTON

IN THE MATTER OF WAYNE LORANGER and PETER HILL, Appellants, v. STATE OF WASHINGTON DEPARTMENT OF ECOLOGY, Respondent.	PCHB Nos. 85-181 and 85-236 FINAL FINDINGS OF FACT, CONCLUSIONS OF LAW AND ORDER

THIS MATTER, the appeal of an Order (DE 85-583) requiring control of the emission of fugitive dust in the Wenatchee area, and of a notice and order of civil penalty came on for formal hearing before the Pollution Control Hearings Board; Lawrence Faulk (Presiding), Gayle Rothrock and Wick Dufford on November 19, 1985, at Wenatchee, Washington. Joan M. Steichen, court reporter, recorded the proceedings.

Appellants represented themselves. Respondent Department of Ecology (DOE) appeared by Assistant Attorney General Terese Neu

Richmond. The two cases have been consolidated for hearing and the parties have agreed that the hearing held and the record created for PCHB 85-181 can serve as the record for PCHB 85-236 since they concern the same facts.

Having heard the testimony, having examined the exhibits, having considered the contentions of the paties; and the Board having served its proposed decision upon the parties herein, and having received exceptions thereto; and the Board having considered the exceptions, and having granted the exceptions in part and denied said exceptions in part, the Board now makes these

FINDINGS OF FACT

I

Respondent DOE is a state agency with responsibility for conducting a program of air pollution prevention and control pursuant to the Washington Clean Air Act, chapter 70.94 RCW, in Chelan County, the site of the events at issue in this case.

II

This case involves the application of air pollution regulations to a dusty road.

Appellants Loranger and Hill each own a lot which is served by an access road to Ramona Avenue in Wenatchee, Washington. The lots (Lots 2 and 3) were originally a part of a larger parcel which included what are now at least three other parcels also served by the road.

Easements for use of the road were created in favor of the owners of all the lots served by the road. However, with the purchase of

Lots 2 and 3, appellants Loranger and Hill, between them, also purchased the fee interest in the road. Their easements, therefore, were merged in the fee.

Prior to the purchase and development of Lots 2 and 3, the other easement holders, owners of non-commercial residences, were the only frequent users of the access road.

III

Three triplex apartments have been built and rented out--two on Lot 2 (Loranger) and one on Lot 3 (Hill). The volume and frequency of traffic over the access road have increased dramatically. The road is approximately 30 feet wide and 256 feet long. It is unpaved.

Before the triplexes were built, the road surface was of gravel and compacted dirt but there was not a significant dust problem.

IV

In the spring of 1984, appellants began developing Lots 2 and 3. This necessitated excavation of the road for utilities. When the excavation was backfilled, the dirt surface was left uncovered and untreated for a short period of time.

V

In mid-April, 1984, the appellants purchased 58.15 tons of gravel which was spread over the road and graded and compacted. Despite this, increased traffic on the road during the summer created dusty conditions on adjacent properties.

VI

The dust problem with the road, which is the subject of these

cases, surfaced again in the spring of 1985. In the spring of 1985, a resident of the area who uses the road to gain access to her garage communicated with appellants and asked them to solve the dust problem. Appellants did have the road graded and compacted, but refused to institute a permanent solution. The result was that dust continued to be a problem for the residents of the area, including those living in appellants' triplexes. A complaint was filed with the Department of Ecology (DOE).

VII

On June 20, 1985, the DOE wrote to the appellants indicating that their road had become a dust problem and that they should, as owners of the road, correct the problem. On June 28, 1985, the DOE again wrote to the appellants indicating that a complaint had been registered with DOE; that pollution control of this road was the responsibility of the appellants and that violations of the regulation might have a daily maximum fine of up to one thousand dollars.

VIII

In July of 1985, a DOE inspector visited the site and by observation verified extremely dusty conditions. Thereafter, another resident complained to DOE even though the original complainants had oiled a portion of the road at their own expense.

IX

On August 27, 1985, DOE issued Order No. DE 85-583 which cited appellants for maintaining a dust source in violation of WAC 173-400-040. It ordered corrective action as follows:

1. Immediately control dust emissions from the road.

2. Within 15 days after receipt of this Order, submit a report that describes the method used to control road dust emission, including a maintenance schedule if appropriate.

3. Nothing in this Order shall relieve the owners from complying with the requirements of other state, federal, or local rules or regulations.

X

Appellant, feeling aggrieved by the Order, appealed to this Board on September 17, 1985, and the matter became our cause number PCHB 85-181. On September 26, 1985, the Board advised the parties that the Order was stayed pending the decision of this Board by virtue of RCW 70.94.333(5).

XI

The original complainant, who lives in a single family residence served by the access road, testified that in the summer of 1984 and 1985, dust, stirred up by the traffic and wind, was a severe problem for her and her husband. She said that their lot was so inundated with dust as to prevent comfortable use of the yard and necessitate extensive clean-up efforts to preserve plantings. A thick layer of dust was deposited on materials left in the garage. She said she has an allergy to dust which has been aggravated.

A neighbor who lives in a house across the street from where the access road meets Ramona Avenue testified to being bothered by increased dust since the development of Lots 2 and 3 began. She stated that she must do much more vacuuming and cleaning inside the

house because of the dust. She, too, said she has allergies which have been aggravated and that her grandchildren also have been bothered by the dust.

Both complaining witnesses felt that the dust conditions arising since the construction on Lots 2 and 3 significantly interfere with their enjoyment of life and of their property.

Notwithstanding the unusual susceptibilities of these complainants, we find that dust is generated from the access road in amounts beyond that which is ordinarily tolerated, causing unreasonable detriment to the welfare of persons and property. A petition of 25 persons who live near the access road, including occupants of the triplex units built by appellants, was filed with the DOE in September, 1985. The petition protested the dusty conditions from April 1984 to the present. We find that most, though not all, of the dust is generated by residents of the new triplex units.

XII

We find further that actions taken to date do not constitute reasonable precautions to prevent fugitive dust from becoming airborne nor the maintenance and operation of the road so as to minimize emissions.

XIII

Appellants contend that they have ameliorated the dust problem as much as necessary, consistent with their responsibility as owners of Lots 2 and 3 and of the road. It would cost approximately $7,000 to permanently solve the problem by paving the road with asphalt.

Appellants believe that the owners of other lots served by the road have a responsibility to share in the expense of solving the problem. Appellants indicated they are willing to pay 40 percent of the cost.

XIV

On November 14, 1985, DOE issued Order number DE 85-757 assessing a $1,000 penalty against appellants for the continuing dust problem on this easement road. On November 27, 1985, appellants, feeling aggrieved by the civil penalty, appealed to this Board, and the matter became our cause number PCHB 85-236.

XV

Any Conclusion of Law which is deemed a Finding of Fact is hereby adopted as such.

From these Findings of Fact the Board comes to these

CONCLUSIONS OF LAW

I

The Board has jurisdiction over these persons and these matters. Chapters 43.21B and 70.94 RCW.

II

The Legislature of the State of Washington has enacted policies in the Clean Air Act, Chapter 70.94 RCW, providing for the prevention and limitation of particulate emissions from air pollution sources, which sources must be kept under close control and careful supervision.

III

WAC 173-400-040(5) and (8)(a) which implement the law read as follows:

WAC 173-400-040(5):

> Emission of air contaminants detrimental to persons or property. No person shall cause or permit the emission of any air contaminant from any source, including any air contaminant whose emission is not otherwise prohibited by this chapter, if the air contaminant causes detriment to the health, safety, or welfare of any person, or causes damage to property or business.

WAC 173-400-040(8)(a):

> Fugitive dust sources. The owner or operator of a source of fugitive dust shall take reasonable precautions to prevent fugitive dust from becoming airborne and shall maintain and operate the source to minimize emissions.

IV

We conclude that the dust from the access road owned by appellants caused detriment to the welfare of persons and property sufficient to violate WAC 173-400-040(5).

We are sensitive to the fact that the appellants, though they own the road, are not the only persons with a property interest in it. We are likewise aware that, to some degree, access to the properties of those who have only easements is contributing to the problem.

Nonetheless, we conclude that the appellants' participation in the violation makes it appropriate for them to be held to have "caused" or "permitted" it for the purposes of the regulation.

V

We conclude further that appellants have violated WAC 173-400-040(8)(a). The terms "owner or operator" are designed to catch in the rule's net those persons whose actions have a close

enough causal connection to the violation to make it reasonable to hold them responsible. We believe, under the facts, that appellants occupy such a position, even though others are also contributing to the problem. But for the actions of appellants, the excessive dust conditions would not exist.

VI

The respondent agency provided the courtesy of advance warning about the need to better control the dust on the subject easement road. Official notice of violation and imposition of a civil penalty logically follow from the advance warning.

VII

The purpose of the civil penalty is not primarily punitive, but rather to influence behavior. The need to promote compliance supports the imposition of a monetary sanction. However, if by suspending all or a portion of the penalty, compliance can be achieved, the objectives of the Clean Air Act have been met. We conclude, given all the circumstances here, that the penalty should be suspended while additional time is provided to achieve a permanent solution involving all contributing residents.

VIII

The regulatory Order No. DE 85-583 seeks to impose on appellants the entire responsibility for solving the problem. Even though appellants have violated the regulation, we conclude that such a sweeping sanction cannot be imposed under the order-authorizing provisions of the State Clean Air Act. The applicable sections--RCW

70.94.332, 70.94.331(1) and 70.94.141(3) empower the enforcing agency to issue orders which are "necessary" in light of the statute's purpose. This standard of "necessity" implies a rule of reason in dealing with a problem caused by the contributions of multiple actors. We do not believe it is legally "necessary" for appellants to solve the entire problem, but merely to bear the burden of solving their share of it.

IX

This is a private road rather than a public street and therefore the municipality is not involved as in City of Vancouver v. SWAPCA, PCHB No. 79-193. However, we think a similar result, recognizing the special benefits of the road to all residents served by it, should be reached. Thus, we conclude the remedial responsibility should relate to all of the residents who are served by the access road. This means apportioning the cost of a solution not on the basis of individual lots, but rather on the basis of the total number of dwelling units served. Accordingly, if twelve such units were the total, appellant Loranger would be responsible for half (his two triplexes). The remainder should be born by Hill and the easement holders in accordance with the number of served units owned by each.

We reach this result by analogy to tort law, where damages for pollution or nuisance are apportioned, when it is feasible and practical to do so. See Snavely v. Goldendale, 10 Wn.2d 453, 117 P.2d 221 (1941); Robillard v. Selah-Moxee Irrig. Dist., 54 Wn.2d 582, 343 P.2d 565 (1959).

X

We recognize that we cannot order the various easement holders, who are not parties to this proceeding, to participate in paying for solving the problem. However, we believe our solution recommends itself as fair and point out that all persons contributing to the problem, not just the appellants in this case, are vulnerable to regulatory action and penalty for the excessive dust conditions which will continue from the road in its present condition.

We further point out that DOE could avoid the procedural inefficiency they perceive in our approach here by including all responsible parties in their Order in the first instance.

XI

Any Finding of Fact which is deemed a Conclusion of Law is hereby adopted as such.

From these Conclusions of Law the Board enters this

ORDER

The Regulatory Order DE 85-583 is reversed. The $1,000 penalty assessed in Order DE 85-757 is suspended on condition that appellants, within two months, agree to participate in a permanent dust suppression project in accordance with the kind of cost-sharing arrangement described in Conclusion of Law IX. This agreement shall be manifested by executing an Assurance of Discontinuance with DOE, pursuant to RCW 70.94.435, on a form to be provided by the Department. This Assurance shall contain a description of the method to be used to control road dust emissions including a maintenance schedule if appropriate and a promise to share costs as provided in this Order. If the Assurance is executed prior to April 14, 1986, the penalty shall, by virtue of this Order, be stricken.

DONE this 7th day of February, 1986.

POLLUTION CONTROL HEARINGS BOARD

2/7/86

LAWRENCE J. FAULK, Chairman

GAYLE ROTHROCK, Vice Chairman

WICK DUFFORD, Lawyer Member